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A GREEN PUBLIC SPHERE IN THE WTO: THE *AMICUS CURIAE* INTERVENTIONS IN THE TRANS-ATLANTIC BIOTECH DISPUTE

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Abstract

In the recent WTO case of European Communities - Measures Affecting the Approval and Marketing of Biotech Products*, three alliances of environmental non-governmental organizations and academics have found a novel way of directly 'inserting' the public concerns of transnational civil society into the dispute resolution arm of the WTO. This paper critically explores both the text and context of these amicus briefs, and shows how, through the mechanism of the amicus curiae brief, the NGO alliances have found a space for the exercise of 'critical public reason' within the judicial organs of the WTO. The paper argues that the briefs have created a green public sphere within the WTO, energised exchanges within broader green transnational and national public spheres beyond the WTO and helped to redress the external accountability gap between the WTO rules and civil society.*

Introduction

From the perspective of antiglobalization protestors, the World Trade Organisation (WTO) is regarded as a mostly functionally determined technocracy ruled by narrow-minded trade ministers, rather than a legitimate democratic governance structure that is responsive to the environmental, health and social concerns of domestic and transnational civil society. The WTO is also regularly invoked within the academy as an exemplary illustration of the democratic deficit in global governance, which Robert Keohane has described as the gap between jurisdiction and impact, or the 'external accountability gap'.[1] Indeed, the more the WTO's rules intrude into domestic politics and constrain national and sub-national legislatures, the more the legitimacy of the WTO's decision-making model of 'executive multilateralism' has come under challenge.[2] The WTO rules do not allow civil society or non-government organizations (NGOs) to participate in, or even observe, trade negotiations[3] and the only formal opportunities for civil society actors to influence international trade policy are indirect, namely, by lobbying their national government and trade negotiators. This typically makes it very difficult for broader, transnational public concerns to find a direct political hearing in the WTO in terms that are not refracted through the trade negotiators of nation-states.

However, in the recent WTO legal dispute between the US, Canada and Argentina and the European Union (EU) concerning the approval of biotech products

[1] See Robert Keohane, 'Global Governance and Democratic Accountability' in David Held and Daniel Archibugi (eds), *Taming Globalization: Frontiers of Governance* (London: Polity, 2003). See also Daniel C. Esty, 'The World Trade Organization's Legitimacy Crisis', *World Trade Review* 1(1) (2002): 7-22.

[2] The phrase 'executive multilateralism' was coined by Michael Zurn in 'Global Governance and Legitimacy Problems', *Government and Opposition* 39(2) (2004): 261-287.

[3] Accredited NGOs are permitted to attend the biennial Ministerial plenaries but they are not allowed to participate or even observe trade negotiations. See *Guidelines for Arrangements on Relations with Non-Governmental Organizations*, WT/L/162 (23 July 1996).

(*EC-Biotech*),[4] a global alliance of environmental NGOs, a group of academics and a coalition of US-based environmental and consumer NGOs have found a novel way of directly 'inserting' the public interest concerns of civil society, along with considered views of 'sociology of risk' scholars, into the dispute resolution arm of the WTO. Through the mechanism of the *amicus curiae* brief, these non-state actors have found a small space for the display of 'critical public reason' within the organs of the WTO that carries the potential to enhance deliberation and narrow the external accountability gap. This paper explores both the text and context of the *amicus curiae* submissions and explains their strategic and communicative appeal from the standpoint of civil society. I suggest that the briefs have created a green public sphere within the WTO and also energised exchanges within broader transnational and national public spheres beyond the WTO. While there are many limitations and uncertainties associated with submitting such briefs, this case study nonetheless highlights their virtues in widening the range of arguments and issues to be contested in the interpretation of WTO rules. Although the outcome of the case is not yet known,[5] the briefs have already deepened the critical scrutiny of the US's position in the broader trans-Atlantic 'GM war' and exposed its limitations as a 'norm entrepreneur' in debates over who should have the political authority to determine matters of biosafety.

More generally, the case study provides a window into the possibilities and limitations of more extensive NGO involvement in the global trading regime. On the one hand, the case highlights a fruitful site of entry into the WTO by civil society that loosens the view that only states are the legitimate subjects and addressees of international trade law. On the other hand, strong resistance by many member states to such a move suggests that more deep-seated civil society involvement in the WTO may be a long time coming.

Background to the Trans-Atlantic Rift over Biosafety[6]

Biosafety is an all-encompassing term that refers to the safety measures that are necessary to prevent actual or possible threats to human health and the environment stemming from genetically modified (GM) organisms produced by modern biotechnology.[7] The selective breeding of plants and animals to improve quality and

[4] *European Communities - Measures Affecting the Approval and Marketing of Biotech Products* (WT/DS 291, 292 and 293).

[5] The closing arguments were presented in Geneva February 2005 and the Panel is considering its decision.

[6] Parts of this section draw on Robyn Eckersley, 'Biosafety and Ecological Security: Resisting the Trade in GM Food', presented at the International Sources of Insecurity Conference, Globalism Institute, RMIT University, Melbourne, 17-19 November 2004.

[7] For the purposes of this paper I adopt the definition of 'modern biotechnology' provided in Article 3(i) of the Cartagena Biosafety Protocol, which 'means the application of: a. In vitro nucleic acid techniques, including recombinant deoxyribonucleic acid (DNA) and direct injection of nucleic acid into cells or organelles, or b. Fusion of cells beyond the taxonomic family, that overcome natural physiological reproductive or recombination barriers and that are not techniques used in traditional breeding and selection'. http://www.biodiv.org/biosafety/articles.asp?lg=0&a=bsp-03 (retrieved 29

yields is hardly new. However, modern biotechnology is qualitatively different from traditional biotechnology insofar as it seeks to 'cross the species barrier' by inserting genes from a foreign species into the cells of the host organism in order to change the characteristics of the host organism. As Jan van Aken explains, 'no traditional breeder is able to cross a carp with a potato, or a bacterium with a maize plant'.[8]

Although research on GM organisms began in the 1970s, the first GM plant was not produced until 1981 and the commercialisation of GM crops did not take off until the mid-1990s.[9] The first generation of green biotechnology has been mainly concerned to improve agricultural yields by, for example, improving the tolerance of crops to weed killing herbicides and insect pests. The second generation of green biotechnology has been directed towards enhancing the shelf-life, nutritional content, taste and colour of agricultural commodities in order to increase their consumer appeal.

Proponents of GM food have claimed that modern biotechnology can orchestrate a second 'green revolution' in agriculture by improving environmental quality (e.g., by reducing the use of pesticides and herbicides), producing higher and better quality yields and solving the problem of world hunger. Opponents, however, have raised fears of 'Frankenstein food', and pointed to a range of risks to human health, biodiversity and traditional and organic agriculture.[10] Some critics believe that the biotechnology industry will follow the same path as the nuclear power industry, which began with exaggerated claims about the benefits of the new technology and ended with an uneconomic and discredited industry that left in its wake contaminated sites and sick communities.[11] Others have raised fundamental moral objections to the idea of humans 'playing God' by tampering with the basic building blocks of life and the processes of 'natural selection'.

The agricultural biotechnology debate has produced a major rift between the corporations and states that promote agricultural biotechnology (chiefly the US, Canada and Argentina) and those states that are more sceptical of the benefits of modern biotechnology (most notably, the EU but also many developing countries). These differences have created a situation of 'regulatory polarisation' between the US 'science-based' approach to risk assessment, which is also reflected in the WTO's Sanitary and Phytosanitary (SPS) Agreement, on the one hand, and the EU's 'precautionary approach', which is also reflected in the Cartagena Biosafety Protocol, on the other.[12] What is most noteworthy and, for the GM agricultural exporters,

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October 2004); Modern biotechnology has produced applications in agriculture, pharmaceuticals as well as in industrial processes. This paper focuses only on agricultural biotechnology.

[8] Jan van Aken, *Centres of Diversity: Global Heritage of Crop Varieties Threatened by Genetic Pollution* (Berlin: Greenpeace International, 1999), 8.

[9] *European Communities - Measures Affecting the Approval and Marketing of Biotech Products* (DS291, DS292, DS293), First written submission by the European Communities, Geneva, 17 May, 2004, 12. For a more extensive history, see Thomas Bernauer, *Genes, Trade and Regulation: The Seeds of Conflict in Food Biotechnology* (Princeton: Princeton University Press, 2003).

[10] For example, critics point to the increase use of herbicides in GM crops, the risk of 'genetic pollution' of wild species and the risks to human health from potential new allergens.

[11] Antony Froggatt and Kerry Rankine, 'Brave New Worlds: The Parallels Between the Introduction of Nuclear Power and Genetic Engineering'. Unpublished ms, no date. See also Bernauer, *Genes, Trade and Regulation*, 5.

[12] For an extensive discussion of regulatory polarisation, see Bernauer, *Genes, Trade and Regulation.* For a more general discussion of the clash of trade and environmental regimes, see Robyn Eckersley, 'The Big Chill: The WTO and Multilateral Environmental Agreements', *Global Environmental Politics* 4(2) (2004): 24-50. Other international regime negotiations concerning the regulation of

controversial about the Biosafety Protocol is that it is the first multilateral environmental agreement to be negotiated in the absence of any clear scientific evidence. Whereas the ozone and climate change negotiations were prompted by major scientific discoveries (such as the 'hole in the ozone layer'), or by extensive scientific research that commanded relatively widespread agreement (the First Assessment Report of the Intergovernmental Panel on Climate Change), the biosafety negotiations proceeded on the basis of growing concern over the *potential* rather than *actual* risks associated with a relatively new and little understood technology. The US has not signed the Protocol.

In 2003, these trans-Atlantic differences were brought to a head when the US, along with Argentina and Canada, commenced legal action in the WTO against the EU after a long period of frustrated diplomacy with the EU over what the complainants regarded as a complicated and time-consuming EU structure for the authorization and marketing of GM crops. In 1998, the EU responded to growing consumer resistance to GM products by resolving to tighten and widen its Directives regulating the release of GM products into the environment, and the labeling and traceability of GM crops – a move that led to the suspension of GM product authorizations in the EU.[13] US frustration in finding accessible markets for its GM products in Europe also coincided with the refusal by many developing countries to accept GM commodities as food aid, either from USAID or the World Food Program (WFP), of which the US is a majority shareholder.[14] While some impoverished countries were eventually prepared to accept GM food that had been milled, the lack of any segregated system in the US for sorting GM and non-GM food and the US's unapologetic posture in delivering GM food aid without informing the recipient countries that the food included GM food has generated further hostility among many developing countries towards the US's aggressive trade and aid policies in this area.[15] Most African nations had also resisted an orchestrated campaign in 1998 by Monsanto (called 'Let The Harvest Begin'), to promote GM crops in Africa, preferring

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health, safety and the environment (e.g. the WHO/Codex Alimentarius, the OECD) have also become a battleground between the US and the EU.

[13] A report by the European Commission had identified a number of deficiencies with the Deliberate Release Directive (90/220), which led to its revision and strengthening. See *Commission of the European Communities, Report on the Review of Directive 90/220/EEC in the Context of the Commission's Communication on Biotechnology and the White Paper*. Com (96) 630, 10 December 1996. Available at http://aei.pitt.edu/archive/00001145/ (retrieved 4 March 2005). The revised Deliberate Release Directive (2001/18) has been in force since October 2002. This Directive has been further amended by the new Regulations on Labelling and Traceability (1830/2003) and on GM Food and Feed (1829/2003).

[14] The WFP had been giving GM food aid to developing countries without informing them that it contained GM food – often against the express regulations of the developing country. See Fred Pearce, 'UN is Slipping Modified Food into Aid', *New Scientist*, 19 September 2002. Available at http://www.connectotel.com/gmfood/ns190902.txt (retrieved 4 March 2005). For a detailed discussion, see Jennifer Clapp, 'The Political Ecology of Genetically Modified Food Aid', Paper prepared for presentation at the International Studies Association Annual Conference, Montreal, Quebec, 17-20 March 2004.

[15] Impoverished Zambia, which was facing a severe food shortage, said it would rather starve than accept GM food. See Afrol News, 'Continued Pressure against Zambia on GM Food', 2004. http://www.afrol.com/News2002/zam009_gmo_foodaid3.htm (retrieved 30 October 2004). Nigeria, which has accepted a promise by USAID to provide $2.1 million to support the Nigeria Agriculture Biotechnology Project, provides one significant exception.

to stand by their traditional agriculture methods.[16] In response to the resistance to GM food in many developing countries, US Trade Representative Robert Zoellick threatened trade sanctions against a number of developing countries that have imposed bans or other trade restrictions on imports of GM foods from the US.[17]

The 'GM offensive' by the world's three largest exporters of GM food reached a head in May 2003, when US, Argentina and Canada (with the strong support of Monsanto), requested formal dispute settlement consultations in the WTO with the EU in relation to the EU's 'de facto' moratorium.[18] The action is also directed against individual EU members - Austria, France, Luxembourg, Germany, Italy and Greece – for banning the importation of certain GM crops for food or agriculture even though they had previously received EU approval. The US claimed that the EU's moratorium is inconsistent with the WTO's rules and it is seeking compensation for the loss of exports resulting from the EU's failure to consider applications for the approval of GM products in a timely fashion. A three-member WTO Panel was convened to hear the dispute and the first hearing of the WTO Panel took place on June 2004.

The major plank of the complainants' case is that the EU's moratorium was not based on scientific evidence or an appropriate risk assessment as required by the WTO's SPS Agreement. This Agreement, finalized in 1994 at the conclusion of the Uruguay round, is designed to ensure that regulations dealing with food safety and human, animal and plant health, do not create unfair or disguised obstacles to trade. This extends to measures restricting international trade in GM products for the purposes of protecting human, animal and plant health and safety. The basic requirement of the Agreement is that if countries adopt standards that are stricter than harmonized international standards then they must be based on a risk assessment, scientific evidence and proper justification.[19] The complainants' argued that there is no nexus between the EU's regulatory measures and appropriate scientific evidence. The complainants have also argued that once the EU had set up an approval system it should have applied it without undue delay and in a transparent manner.[20]

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[16] Robert Vint, 'Force-feeding the World: America's "GM or Death" Ultimatum to Africa Reveals the Depravity of its GM Marketing Policy', *Genetic Food Alert*, 2002, 1. http://www.ukabc.org/forcefeeding.pdf (retrieved 30 October 2004).

[17] The countries threatened include Sri Lanka, Mexico, Thailand, China and Argentina. See Vint, 'Force-feeding the World', 1-2.

[18] Panel request WT/DS291/23.

[19] Article 2.2, 3.2 and 3.3. The SPS Agreement further provides that the measures must not be arbitrary or discriminatory and that they must be the least trade restrictive measure available to achieve the desired purpose (even if they are otherwise shown to be nondiscriminatory). The SPS Agreement only permits the precautionary principle to be applied on an interim basis while a risk assessment is being conducted (Article 5.7). For a more general discussion of the evolution of the rules on science and risk assessment in assessing non-tariff barriers to trade in the WTO, see Doaa Abdel Motaal, 'The "Multilateral Scientific Consensus" and the World Trade Organization', *Journal of World Trade* 38(5) (2004): 855-876. Motaal notes that in the negotiation of the SPS Agreement, the Cairns groups of agricultural commodity exporters played a major role in ensuring that the burden of demonstrating sufficient scientific justification lay with the country of import (p. 863).

[20] Canada and Argentina have also filed submissions and rebuttals. See *European Communities - Measures Affecting the Approval and Marketing of Biotech Products* (WT/DS292), First written submission of Canada, 21 April 2004 and Third Written Submission of Canada, 15 November 2004; and *European Communities - Measures Affecting the Approval and Marketing of Biotech Products* (WT/DS291, DS292 and DS 293), Supplementary rebuttal of Argentina, 15 November 2004.

The US has also seized the opportunity presented by the legal dispute to make a virtue out of the refusal by African nations to accept US GM food aid. It has claimed in its submission that the reasons countries like Zambia, Zimbabwe and Mozambique have refused such aid is fear of lack of access to EU markets, implying there are no other significant grounds for the refusal.[21] The US has argued that these decisions have restricted access to GM seeds that 'could substantially boost agricultural productivity and reduce pest damage and pesticide use'.[22] More generally, the US argued that GM know-how 'is crucial to boosting food production in Africa and breaking the cycle of malnutrition and starvation'.[23] Incidentally, the US's position finds support in the Food and Agricultural Organisation (FAO), albeit with some significant qualifications that are not entertained in the US's submission.[24]

In its first written submission, the EU argued that it never adopted a blanket ban and that its assessment procedures were never stalled.[25] Instead it has defended the legitimate right of each state within the EU to regulate the approval process following a careful risk assessment based on the precautionary principle, detailed approval and monitoring measures, and consumer information (including labeling).[26] The submission also suggests that the Biosafety Protocol (of which the EU is a party) confers a 'right' on parties to take a precautionary approach,[27] that there has been no undue delay and that the EU's actions can be justified on the basis of insufficiency of relevant scientific evidence. More generally, the EU has argued that the GM issue is too complex to be governed by the SPS Agreement alone.

Enter the Amicus Curiae *Briefs*

Two months prior to the oral hearing, two *amicus curiae* briefs were submitted to the WTO Dispute Panel by a coalition of 15 public interest groups from four continents ('the NGO brief')[28] and a group of five leading academics with research expertise in

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[21] *European Communities*, First Submission by the United States, paragraph 65.
[22] *European Communities*, First Submission by the United States, paragraph 66.
[23] *European Communities*, First Submission by the United States, paragraph 66.
[24] See FAO, *The State of Food and Agriculture 2003-2004*, available at http://www.fao.org/documents/show_cdr.asp?url_file=/docrep/006/Y5160E/Y5160E00.HTM (retrieved 5 March 2005). One of the key conclusions of the report is that 'Biotechnology - including genetic engineering - can benefit the poor when appropriate innovations are developed and when poor farmers in poor countries have access to them on profitable terms. Thus far, these conditions are only being met in a handful of developing countries'. (See Part 1, Key lessons from the report).
[25] *European Communities - Measures Affecting the Approval and Marketing of Biotech Products* (WT/DS 291, 292 and 293), First Submission by the European Communities, 17 May 2004.
[26] The moratorium has since been lifted and the European Communities' submission points to the approval of a new variety of GM sweet corn on 19 May 2004 as evidence that each case is properly assessed on its merits, and that some approvals have now been forthcoming. However, in its rebuttal, the US has argued that this is no indication that the moratorium has been lifted, or that the EU is now meeting its WTO obligations.
[27] First *European Communities*, Submission by the European Communities, Paragraph 107.
[28] Alice Palmer, Programme Director FIELD, *Amicus Curiae Submission European Communities – Measures Affecting the Approval and Marketing of Biotech Products (DS291; DS 292; DS293)* April

the sociology of risk assessment ('the academic brief').[29] The press conference publicizing the legal intervention was held in Geneva in May 2004, which coincided with the WTO's annual NGO Symposium, an event designed to bring together the international community of NGO, academics, and other civil society actors for the purposes of critical discussion about global trade policy.

The main argument of the briefs is that the impatience of biotech companies and the WTO rules should not be allowed to overrule the legitimate right of countries to make their own decisions about the safety of GM products.[30] The briefs emphasize the newness of the technology and the necessity of a precautionary approach. They also argue that the complainants, along with biotech companies, have overstated the presently known benefits of GM agricultural products and underplayed the risks. The academic brief is particularly noteworthy for its presentation of research into the sociology of risk assessment, which challenges conventional notions of risk assessment and the authority of the WTO dispute process to rule on the merits of the EU's regulations and decisions. The academic brief effectively calls upon the WTO dispute panel to recognize the unavoidably *social* context of risk assessment.[31] In particular, it mounts a strong challenge to the traditional notion of scientific risk assessment as a factually grounded, value free and objective assessment that identifies potential harm and assesses the likelihood of such harm. Instead, it emphasizes that risk assessment is neither a single methodology nor a science.[32] Accordingly, risk assessment findings in one jurisdiction ought not to be uncritically transposed onto other jurisdictions because they are necessarily socially, culturally and environmentally specific to different communities – a point that was subsequently picked up the EU in its oral presentation before the Panel.[33] The brief argues that risk situations should be understood as lying within a matrix defined by two variables: certainty and consensus. GM risks fall in the low end of this matrix (low certainty and low consensus), which makes the scientific basis for risk assessment especially fluid and changing within different regulatory contexts. In sum, the brief argues that risk assessment and management require extensive public deliberation and should be left to democratic communities and not surrendered to scientists or indeed the WTO. The appropriate role of the WTO dispute resolution panel should not be to review the

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2004 (on behalf of 15 NGOs). Available at http://www.genewatch.org/WTO/Amicus/PublicInterestAmicus.pdf (retrieved 31 October 2004).

[29] Busch, Lawrence, Robin Grove-White, Sheila Jasanoff, David Winickoff and Brian Wynne. *Amicus Curiae Brief Submitted to the Dispute Settlement Panel of the World Trade Organization in the Case of EC: Measures Affecting the Approval and Marketing of Biotech Products*, 30 April, 2004. Available at http://www.lancs.ac.uk/fss/ieppp/wtoamicus/ (retrieved 30 October 2004).

[30] On the more general issue of biotechnology, the NGO brief argued that GM crops have been developed to serve the interests of large farmers in the developed world; that the intellectual property rights and monopoly control of seeds gives too much power to corporations, at the expense of poor farmers; that herbicide use is likely to increase (such as Round-up); that yields in GM crops are variable; that there is a serious risk of contamination of non-GM crops, which are related to wild species; and that Argentina is suffering harmful effects from the introduction of GM agriculture, particularly soy (see Palmer, *Amicus Curiae Submission*).

[31] Busch et al, *Amicus Curiae Brief*.

[32] Busch et al, *Amicus Curiae Brief*, 5.

[33] *European Communities - Measures Affecting the Approval and Marketing of Biotech Products* WT/DS 291, 292 and 293, Oral Statement by the European Communities at the First Meeting of the Panel with the Parties, 2 June 2004, Geneva, Para 15.

merits of the EU's decision, but simply to judge whether the EU's regulatory framework has been properly followed in a nondiscriminate manner.

On the eve of the first hearing of the WTO Panel in June 2004, five US-based environmental and consumer NGOs joined the fray by filing an *amicus curiae* brief.[34] This third brief focuses primarily on the question of scientific uncertainty, pointing out that the 'absence of evidence' of harm (arising from a limited number of studies, or from poorly conducted studies) should not be treated as 'no evidence of harm'.[35] The brief challenges the scientific evidence relied upon by the US, arguing that much of it has not been peer-reviewed or subjected to public scrutiny. More generally, the brief emphasizes the general scientific uncertainty arising from the random nature of rDNA techniques, and the lack of knowledge concerning the longer-term effects of the exposure of GM organisms on other living organisms and the environment, all of which are seen to provide good justification for the application of the precautionary principle.

The WTO law and politics on amicus curiae *submissions*

The submission of *amicus curiae* briefs to the judicial arm of the WTO is a relatively recent and controversial innovation. The WTO's Dispute Settlement Understanding (DSU) establishes a decentralized method of enforcing WTO agreements that is restricted to the specific parties to particular disputes. If negotiations between the parties fail to resolve the conflict, then the matter is heard by a Dispute Panel made up of three experts (five if both parties agree) in relation to the subject of the dispute. Appeals against Panel decisions on questions of law may be taken to the Appellate Body, which is made up of international lawyers. Article 13 of the DSU provides that Panels 'shall have the right to seek information and technical advice from any individual or body which it deems appropriate'. In 1998, the Appellate Body interpreted this provision to extend to the acceptance of unsolicited *amicus curiae* briefs.[36] The Appellate Body has also declared that it has legal authority to solicit briefs by formal invitation on an ad hoc basis, although it has not yet formally declared itself able to accept unsolicited briefs.[37]

Amicus curiae briefs are controversial to many WTO members precisely because the practice enables non-members to make representations to a Panel or the Appellate Body and thereby influence the interpretation of WTO law. Although

[34] Center for International Environmental Law (CIEL), Friends of the Earth-US (FOE-US), Defenders of Wildlife, Institute for Agriculture and Trade Policy (IATP), and The Organic Consumer Association – USA (OCA-USS), *Amicus Curiae Brief*, 1 June 2004. Available at http://www.ciel.org/Publications/ECBiotech_AmicusBrief_2June04.pdf

[35] *European Communities - Measures Affecting the Approval and Marketing of Biotech Products* (DS291, DS292, DS293), Amicus Curiae Brief, CIEL, FOE-US, Defenders of Wildlife, IATP, and OCA-USA), 1 June 2004, p. 5.

[36] United States – Import prohibition of certain shrimp and shrimp products, WT/DS58/AB/R of 12 October 1998, para. 187. (a).

[37] Petros Mavroidis, 'Amicus Curiae Briefs before the WTO: Much Ado About Nothing', in A. Bogdandy, P. Mavroidis and Y. Meny (eds.), 2002. *European Integration and International Coordination: Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (Den Haag: Kluwer Law International), 317-29, 321.

dispute rulings are, strictly speaking, only binding on the parties, an influential *de facto* WTO jurisprudence has nonetheless developed.[38] When the Appellate Body chose to invite briefs in the *Asbestos* litigation, an extraordinary meeting of the WTO General Council was convened wherein many WTO members voiced their disquiet over the idea that non-members should be given rights to submit such briefs while WTO members could not (unless they were a party to the dispute).[39] The Appellate Body subsequently chose not accept the *amicus curiae* briefs that had been submitted in the *Asbestos* litigation, which can only be interpreted as an act of capitulation by the judicial arm before the political arm of the WTO. In general, support for *amicus curiae* submissions among WTO members is restricted to only a handful of developed countries, including – as it happens – the US and the EU.[40] Developing countries, particularly in Asia, are opposed to the practice and ASEAN has strongly resisted a proposal advanced by the Office of the US Trade Representative to develop more positive and less ambiguous rules for *amicus curiae* submissions.[41]

There are, of course, many limitations associated with *amicus curiae* briefs. For example, *amici* are not served papers, they cannot offer evidence, examine or cross-examine witnesses or seek recovery of costs.[42] More importantly, there is never any guarantee that the brief will be accepted. In the WTO context, Panels are under no duty to respond to unsolicited briefs, and both Panels and the Appellate Body may exercise their discretion to ignore such briefs. However, the Panels are known to be conscientious and they can usually be expected to read *amicus* briefs in order to reach a considered judgment about whether or not to accept them. Even if the Panel rejects a brief, one or other of the parties may choose to draw on the publicly available briefs in order to advance their argument (which the EU has done in this case).

While *amicus curiae* briefs remain controversial among WTO members, and carry many restrictions, they nonetheless provide an important and, in the WTO context, rare opportunity for non-members (such as NGOs) to submit representations and voice concerns that transcend the interests of the individual states that are parties to the dispute. The phrase *amicus curiae* literally means 'friend of the court'.

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[38] Raj Bhala, 'The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)'. *American University International Law Review* 14(4) (1999): 845-956 and Adrian Chua, 'The Precedential Effect of WTO Panel and AB Reports', *Leiden Journal of International Law* 11(1) (1998): 45-61.

[39] *European Communities – Measures affecting asbestos and products containing asbestos* (DS135/R) and (DS135/R/Add.1). The document inviting briefs is DS135/9. The Appellate Board cited Article 16(1) of the Working Procedures for Appellate Review as the necessary legal authority that enabled it to call for briefs. For a more detailed discussion see Mavroidis, 'Amicus Curiae Briefs before the WTO' and Geert A. Zonnekeyn, 'The Appellate Body's Communication on *Amicus Curiae* Briefs in the *Asbestos* Case', *Journal of World Trade* 35(3) (2001): 553-563.

[40] The Office of the United States Trade Representative, 'US Proposes Greater Openness for WTO Disputes', Press Release, 9 August 2003; available at http://www.state.gov/e/eb/rls/othr/12709.htm (retrieved 5 March 2005).

[41] Ernesto Hernandez-Lopez, 'Recent Trends and Perspectives for Non-State Actor Participation in the World Trade Organization Disputes', *Journal of World Trade* 35(3) (2001): 469-98, 492-93. See also 'Asean Rejects US Call for NGO Access to WTO Dispute Process'. *The Business Times Singapore*, 17 September 2002. Available at http://www.wtowatch.org/headlines.cfm?RefID=17699 (retrieved 21 February 2005).

[42] Robert Shelton, 'The Participation of Nongovernment Organizations in International Judicial Proceedings', *American Journal of International Law* 88(1994): 611-642, 612.

Amici seek the permission of the court to share their special expertise and thereby 'help' the court in its judicial deliberation by drawing its attention to matters and arguments that might not otherwise be submitted by the parties to the dispute. For example, the coalition of US-based environmental and consumer NGOs argued in their brief that they were 'well respected in the environmental community and recognized in that context for their expertise in the field of trade and environment, and will thus provide valuable factual and technical information for the Panel's consideration'.[43]

In some cases (including this case study), *amicus* briefs may favour the arguments submitted by one party. However, the *amicus* briefs in this case study also go well beyond the issues raised in the EU's submission. Moreover, if due process is followed, all parties are given the opportunity to react to the submission and in some cases they may choose to incorporate all or some of the submission. As in courts of national jurisdiction, *amici* are not limited to the matters pleaded by the parties, and they need not demonstrate any direct, personal or financial interest in the proceedings of the kind required by third party interventions.[44] *Amicus curiae* submissions typically raise matters of general or public importance – matters that transcend the interests of the parties. As we have seen, this is their primary appeal to NGOs. As the US-based NGO submission put it, through *amicus curiae* briefs, 'Panels can ensure the participation of all affected sectors of the public, which, particularly in cases of high political sensitivity, also increase the legitimacy of decisions made in the context of the WTO dispute settlement'.[45]

More generally, the posting of the NGO briefs on the internet along with media events such as press conferences help to increase public awareness of the dispute resolution process within the WTO while also offering alternative ways of framing the issues and arguments presented by the parties. Such publicity measures can serve to increase domestic pressure on particular member states. Even if the Panel chooses not to accept the *amicus* submissions, they will inevitably become more keenly aware of their role in shaping international norms, and the consequences of those norms. When asked whether the *amicus* briefs are likely to have any influence on the dispute resolution process, the eminent trade lawyer Robert Howse – who chaired the NGO and academic coalition press conference in Geneva in May 2004 – responded that once the Panel members had read the briefs they would find it difficult to 'cleanse their minds' of them.[46]

The broader significance of the amicus curiae *briefs in* EC-Biotech

Although the trans-Atlantic biosafety dispute is being formally dealt with as a trade dispute in the WTO, it raises a host of politically charged issues concerning human, animal and ecosystem health, local food cultures, food security, corporate control,

[43] *European Communities - Measures Affecting the Approval and Marketing of Biotech Products* (DS291, DS292, DS293), CIEL et al, *Amicus Curiae Brief,* 5.
[44] Shelton, 'The Participation of Nongovernment Organizations in International Judicial Proceedings', 611.
[45] CIEL et al, *Amicus Curiae Brief,* 5.
[46] This quote is based on my own personal recall of the press conference held at the World Meteorological Organisation in Geneva on 27 May 2004.

intellectual property rights, or appropriate risk assessment procedures in the face of scientific uncertainty and the clash of different national and global governance systems. In complex debates of this kind, normative arguments, questions of procedural justice and the preference given to particular governance systems are deeply entwined.

As we have seen, the complainants, led by the US, have chosen the WTO as the appropriate forum to determine this dispute because it is a powerful governance structure that is explicitly designed to minimize restrictions on international trade. The WTO's SPS Agreement also upholds an objective, 'science-based' approach to risk assessment that is also broadly compatible with the US's own national regulatory system. Claims by the US that free trade in green biotechnology will help to solve the problem of world hunger are offered as moral reinforcement to the US's commitment to free trade in GM products.[47]

In contrast, the EU has largely framed the issue in terms of its internal constitutional and international obligations to uphold the precautionary principle in the face of scientific uncertainty over the risks associated with a relatively new technology. Although the European Commission is less skeptical of the risks of agricultural biotechnology than many of its member states (particularly Austria, Italy and Germany), through its complicated law making processes the EU has produced a set of Directives that reflect widespread consumer skepticism in Europe towards GM agricultural products, which are seen as providing no obvious benefits and many potentially serious and irreversible risks.

All the *amicus curiae* submissions generally reinforce the EU's arguments in favour of the precautionary principle, but they also raise a range of additional arguments that seek to circumscribe narrowly the role of the WTO in determining biosafety disputes. At the same time, the submissions seek to defend regulatory diversity against the harmonization of standards at the international level (which is encouraged by the SPS Agreement). The harmonization of standards carries the danger of elevating the authority of science 'above' ordinary democratic processes. In effect, the briefs seek to 'remind' the Panel of one of the core insights emerging from the postpositivist revolution in the social sciences: that science can contribute to democracy by enabling more informed deliberation, but it ought not usurp the role of political communities, through their representatives, to make practical judgments about what risks are unacceptable – judgments that are likely to vary from jurisdiction to jurisdiction.[48]

More generally, the *amicus curiae* submissions provide a quintessential defence of the virtues of reflexive modernization over simple modernization. The

[47] Of course, there is also a moral dimension to the free trade argument. Indeed, Jens Steffek has argued that the conflicts between the US and the EU must be understood as conflicts of principle, not merely interests, and the American preference for free markets and European market skepticism are rooted in popular morality in the two regions. Jens Steffek, 'Free Trade as a Moral Choice: How Conflicts of Principle Have Troubled Transatlantic Economic Relations in the Past, and How a "Council on Trade and Ethics" Could Help Prevent Them in the Future', in European University Instituute (ed.), *Preventing Transatlantic Trade Disputes: Four Prize-winning Essays* (Florence: European University Institute, 2001), 45-55.

[48] Jurgen Habermas, *Toward a Rational Society: Student Protest, Science and Politics*, translated by Jeremy J. Shapiro (London: Heinemann Educational Books, 1971). For a similar argument that focuses on the relationship between science, risk and the SPS Agreement, see Robert Howse, 'Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organisation', *Michigan Law Review* 98(7) (2000): 2329-57.

WTO governance structure in general is geared towards trade liberalization and the benefits of technological diffusion, all of which are presumed to bring global, positive-sum benefits unless contrary evidence showing harm can be successfully raised. The precautionary principle challenges this presumption upon which simple modernization is based and introduces a new presumption that demands more reflexive or critical consideration of the role of new applications of instrumental reason and the broader modernization process.[49] In this respect, the *amicus* briefs are strongly reminiscent of the Frankfurt School's concern to 'rescue reason' by defending the role of critical reason in keeping instrument reason in check.[50] The twentieth century is littered with examples of new technologies that produced unintended and unwanted environmental and health side-effects, such as DDT, CFCs, or PCBs. Agricultural biotechnology, dubbed 'the second green revolution', represents a qualitative leap in the application of instrumental reason to nature, the full consequences of which are only dimly understood. The accumulation of unwanted and unintended environmental problems in the last five decades has produced a growing lack of public trust in experts and a much deeper skepticism among many citizens and consumers about the claimed benefits of new technologies.

Alongside the increasing public skepticism towards the claims of experts is an increasing awareness of the deeply skewed distribution of environmental risks and benefits resulting from the research, development and application of agricultural biotechnology. Against this background, the *amicus* submissions also serve to expose as somewhat disingenuous the US's moral case that agricultural biotechnology is a 'white knight' that promises to save the world from hunger. Such a 'technical fix' response to the complex problem of world hunger conveniently obscures questions such as the control of intellectual property rights, the autonomy of small farmers and, above all, the in-built dynamic of trade liberalization to generate uneven development, and winners and losers.

According to Ulrich Beck, reflexive modernization calls for a radical rethinking of the 'relations of definition', understood as the structures of authority that define, assess and manage risks, and, arising out of this rethinking, the development of new forms of ecological democracy.[51] While Beck's particular formulation of ecological democracy remains only schematic, environmental political theorists who have developed this concept in more detail have emphasized the importance of full

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[49] Critics of the precautionary principle, such as Cass Sunstein, have argued that it is a crude and sometimes perverse way of assessing risks that can be paralyzing because there are always risks on both sides of every regulatory choice. This critique is directed against strong rather than weak interpretations of the precautionary principle that seek to halt risky activities when the potential harm is serious and the science is uncertain, even though the probability of harm may be low and failure to proceed may leave other potential risks ignored and potential benefits lost. In short, Sunstein believes those applying the precautionary principle to GM food or global warming have restricted society's focus to only a subset of risks. While I disagree with much of Sunstein's assessment, I agree with his general conclusion that we should 'widen the viewscreen' as much as possible in any risk assessment exercise. The core argument in this paper is that inclusive and unconstrained deliberation in public spheres is the most likely route to the fulsome risk assessment that Sunstein defends. Cass Sunstein, 'Beyond the Precautionary Principle', University of Chicago Public Law and Legal Theory Working Paper No. 38 (2003). Available at http://www.law.uchicago.edu/academics/publiclaw/

[50] See, for example, Theodor Adorno and Max Horkheimer, *The Dialectic of Enlightenment* (New York: Herder, 1972).

[51] Ulrich Beck, *The Risk Society: Towards a New Modernity*, translated by Mark Ritter (London: Sage Publications, 1992).

information and the unconstrained, public testing of arguments from the vantage point of all those affected – in short, deliberative democracy.[52]

In the remainder of this paper I build on recent work on the relationship between deliberative democracy and public spheres at the transnational level in order to explore the opportunities for the greening of communicative action within the WTO. I suggest that the *amicus curiae* submissions have created a modest 'green public sphere' within the judicial arm of the WTO, and conclude with some reflections on the strategic and communicative significance of *amicus curiae* briefs within the WTO.

Bargaining versus deliberation

According to dominant rationalist approaches to the study of international regimes, multilateral negotiations are assumed to involve purely or primarily strategic behaviour on the part of states.[53] International agreements are understood as bargains reached by parties on the basis of strategic assessments that entail cost-benefit calculations about 'interests' from the standpoint of each individual party to the negotiations. Like in any contractual negotiations, the parties are not interested in the consequences of their bargain for non-parties. The preferences and goals of other parties merely serve as limiting conditions, and each negotiator assumes that others will be acting according to their own interests. Moreover, outcomes are heavily dependent on the bargaining power of the parties, including their relative ability to offer threats and inducements and carry out promises. Finally, any compromise reached is understood not to affect the preferences, interests or identities of the parties because it represents a strategic bargain rather than a genuinely shared understanding that is 'internalized' as appropriate to the collective problem.

In contrast to strategic interaction, deliberation (or 'communicative action') is understood to entail the making of normative or empirical claims that are supported with reasons that are intended to appeal to the public that is affected by the claims. The point of deliberation is to *persuade* others to *freely accept* the *appropriateness* of certain norms or actions, rather than to induce others to agree to a compromise on the basis of threats or promises, or the mere status of the speaker. This necessarily requires arguments that appeal to common, rather than partisan, interests and concerns. To succeed, arguments and justifications must find a hook with widely shared held norms, common experience, accepted precedents or other forms of consensual knowledge that provide a common reference point to enable mutual understanding. The point of deliberation is to reach a reasoned consensus, or at

[52] See, for example, John S. Dryzek, 'Green Reason: Communicative Ethics for the Biosphere', *Environmental Ethics* 12 (1990): 195-210 and Robert Goodin, 'Enfranchising the Earth, and its Alternatives', *Political Studies* 44 (1996): 835-49.

[53] In this discussion I employ the term regime in accordance with Stephen Krasner's widely accepted definition of a regime as a set of 'implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given issue area'. See Stephen D. Krasner (ed.) *International Regimes* (Ithaca, N.Y.: Cornell University Press, 1983), 2.

least a reasoned disagreement if no consensus can be reached.[54] Whereas strategic bargains typically provide a reflection of the relative bargaining power of the parties, agreements reached by unconstrained deliberation are, ideally, based on the power of the better argument, irrespective of the status or identity of the proponent.

Over the last decade, a broad consensus has emerged among environmental political theorists that deliberative democracy is generally more conducive to protecting generalisable interests such as public health and environmental protection than bargaining. Since these arguments have been widely rehearsed elsewhere,[55] my primary concern in this paper is to join those who have taken the 'empirical turn' in deliberative democracy[56] by identifying the opportunities and conditions that are most conducive for deliberation within global governance in general, and the WTO in particular. This approach may be understood as both strategic and communicative in that it offers practical guidance to effective political action in global politics while also seeking to maximize the opportunities for deliberation.

As we have seen, the dominant rationalist approach to understanding multilateral regimes has assumed a strategic bargaining model of negotiation. This assumption resonates strongly with the way in which 'executive multilateralism' is practiced within the WTO's trade negotiation committee. Nonetheless, recent empirical work on the role of deliberation in international politics has shown that most multilateral negotiations contain a mixture of bargaining and deliberation.[57] Of course, much depends on the nature of the institutional setting, the context of the negotiations and the knowledge and argumentative capabilities and dispositions of the parties.[58] Indeed, there may be different sites for negotiation and interpretation within particular multilateral organizations, or during particular phases of negotiation, some of which may be more conducive to deliberation than others. Identifying and fostering these sites and phases is an important research task for environmental political theorists. However, most of the new scholarship on the role of deliberation in international politics has focused on the negotiation of multilateral norms. In what follows, I build on this work while also drawing attention to the neglected area of legal argument and judicial interpretation as a site for deliberation, which is highlighted by *EC-Biotech*. I also develop Jurgen Habermas's concept of the public sphere to connect the deliberative rule-making and rule-interpreting phases of international politics to transnational civil society.

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[54] Amy Guttman and Dennis Thompson. *Democracy and Disagreement* (Cambridge, M.A.: Harvard University Press, 1996).

[55] See for example, Dryzek, 'Green Reason'; Goodin, 'Enfranchising the Earth' and Robyn Eckersley, 'Deliberative Democracy, Ecological Representation and Risk: Towards a Democracy of the Affected' in Michael Saward (ed), *Democratic Innovation: Deliberation, Association and Representation* (London: Routledge, 2000), 117-132.

[56] See James Bohman, 'The Coming of Age of Deliberative Democracy', *The Journal of Political Philosophy* 6 (1999): 400-425.

[57] See, for example, Thomas Risse, 'Let's Argue: Communicative Action in World Politics', *International Organisation* 54 (2000): 1-39 and Ian Hurd, 'Legitimacy and Authority in International Politics', *International Organisation* 53(2) (1999): 379-408.

[58] Thomas Risse and Cornelia Ulbert, 'Deliberately Changing the Discourse: What Does Make Arguing Effective?' *Acta Politca*, 2005, forthcoming.

Public Spheres in Global Governance

Habermas's idea of the public sphere provides a conceptual framework that has been fruitfully applied as both a sociological theory and normative yardstick by which to recognize and evaluate deliberation in international politics. Although Habermas developed his notion of the public sphere to connect the state and civil society in the domestic context, he has acknowledged the emergence of public spheres on the international stage.[59] Moreover, an increasing number of scholars have applied this concept to international politics.[60] Public spheres are simply those communication networks or social spaces in which public opinions are formed. Participants within these networks may address a real and present public and/or a broader, imaginary 'public' (that is affected by proposals) with reasoned arguments with a view to seeking agreement by means of the force of the better argument. Understood in these terms, public spheres provide a key mechanism for social learning, understood as the consensual evolution of societal norms in response to changing circumstances.

On the basis of this very general and preliminary understanding, it is possible to point to multiple public spheres that transcend state boundaries. The public communicative networks and sites in which international public opinions are produced, debated and circulated are many and varied, and may range from face-to-face communication in the Security Council to virtual and transcontinental 'chat rooms' on the internet. Indeed, we can recognize the presence of a transnational public sphere whenever a social agent (state or non-state) provides a justification to a real or imaginary public beyond the boundaries of any one state.[61] To be sure, not all such justifications may be genuine, but the fact that even powerful states, like the US, still find it necessary to provide public justifications for their actions or proposals (e.g. in justifying the invasion of Iraq, or its aggressive trade and aid policies in relation to GM agriculture) is testimony to the significance of communicative action in world politics. Sometimes, however, powerful actors find they are trapped by, and

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[59] Jurgen Habermas, *The Inclusion of the Other: Studies in Political Theory*, edited by Ciaran Cronin, and Pablo De Greiff. (Cambridge, M.A.: MIT Press, 1999), 177.

[60] See, for example, James Bohman, 'The Globalization of the Public Sphere: Cosmopolitan Publicity and the Problem of Cultural Pluralism', *Philosophy and Social Criticism* 24 (April, 1998): 199-216; Bohman, 'International Regimes and Democratic Governance: Political Equality and the Influence of Global Institutions', *International Affairs* 75 July (1999): 499-513; Molly Cochran, 'International Public Spheres as Knowledge Communities Grounded in Human Values', Paper presented to the International Studies Association Annual Meeting, Montreal 2004; John S. Dryzek, 'Transnational Democracy', *The Journal of Political Philosophy* 7 (1999): 30-51; Marc Lynch, *State Interests and the Public Sphere: The International Politics of Jordon's Identity* (New York: Columbia University Press, 1999); Lynch, 'The Dialogue of Civilisations and International Public Spheres', *Millennium: Journal of International Studies* 29 (June, 2000): 187-230; Patrizia Nanz and Jens Steffek, 'Global Governance, Participation and the Public Sphere', *Government and Opposition* 39(2) (2004): 314-335; and Rodger A. Payne and Nayef H. Samhat, *Democratizing Global Politics: Discourse Norms, International Regimes, and Political Community* (Albany. NY: State University of New York Press, 2004).

[61] Lynch, 'The Dialogue of Civilisations and International Public Spheres', footnote 60, 318.

therefore bound to observe, public justifications that may have been offered in bad faith.

Rodger Payne and Nayef Samhet have suggested that regimes themselves become public spheres *insofar as they promote deliberation:*

> …certain international regimes, by building democratic procedural norms into their design and evolution, acquire the character of incipient transnational political communities. These regimes effectively serve as public spheres whose scope for dialogic interaction amongst a wide array of state and nonstate actors reflect emerging global democratic practices on an unprecedented scale.[62]

Although in his early formulations Habermas positioned the public sphere *outside* the state, his more recent formulations position it 'in-between' the state and civil society.[63] So while we can expect that unconstrained deliberation may be more readily found in civil society rather than the state, incipient public spheres may be found *within* the more formalized communicative exchanges in legislatures, bureaucracies and even judiciaries. Indeed, this is necessary if the processes of political opinion formation and political will formation are to remain connected. Public spheres and rule-making bodies (legislatures, courts, bureaucracies) are overlapping and mutually constitutive rather than mutually exclusive domains.

These linkages between opinion formation in the public sphere, and will-formation, may be usefully applied to understand the informal and formal negotiating and interpreting contexts of regimes. That is, we may characterize formal rule-making or interpreting bodies, such as the conference of the parties (COP) to particular regime negotiations or forums established to resolve disputes in the WTO, as public spheres *to the extent* to which they facilitate an exchange of arguments that appeal to a generalized public that is affected by the proposed rules. The key insight emerging from this conceptualization is that the more incipient public spheres *within* multilateral regimes interpenetrate with the broader public spheres circulating *around* such regimes, the more we can identify horizontal forms of regime accountability that transcend the limitations of 'executive multilateralism'.

However, there are two significant departures from the traditional Habermasian modeling of the relationship between public spheres and law. The first is that the public spheres are relatively specialized, transnational knowledge communities, rather than general and domestic. The second is that the lines of accountability between these more specialized public spheres and rule

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[62] Payne and Samhat, *Democratizing Global Politics*, 9.

[63] The reason *independence* from the state was initially important to the idea of the public sphere for Habermas was because it enabled the exercise of unconstrained, and therefore *critical* and uncoopted, public reason. This enabled Habermas to employ the notion of the 'public sphere' both empirically and normatively; it is not simply a network of publicly justified communication about matters of public importance but also as an *ideal* of unconstrained deliberation. Jurgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, translated by Thomas Burger with the assistance of Frederick Lawrence. Cambridge, M.A.: MIT Press, 1991. More recently, however, he has characterized the public sphere as 'an *intermediary structure* between the political system, on the one hand, and the private sectors of the lifeworld and functional systems, on the other'. See Jurgen Habermas, *Between Facts and Norms*, translated by William Rehg. (Cambridge: Polity Press, 1997), 373.

makers/interpreters are less formalized and more diffuse at the international level compared to the domestic level.

Turning to the first departure, Habermas himself is by no means starry eyed about the potential of public spheres in international politics. Indeed, he has suggested that a global public sphere is highly unlikely and that even transnational public spheres are usually temporary, issue-specific and 'still channeled through the established structures of national public spheres'.[64] Yet these are the very features that appeal to James Bohman, who is likewise pessimistic about the emergence of a *global* public sphere but relatively more optimistic about the development of more specialized cosmopolitan public spheres as new locations for social criticism (both locally and transnationally).[65] A global public sphere is not possible, according to Bohman, because of the impoverished state of the existing global media, which address merely an aggregate (and culturally nonspecific) public chiefly as a passive spectator, which does not engender reflexivity. So while such global media may be public, they do not usually require the public use of *reason*.[66] In contrast, communication in what Bohman calls 'cosmopolitan public spheres' addresses a more differentiated public with particular social roles, knowledge and competencies in a more multilayered and differentiated social space, made possible by the development of a transnational civil society.[67] As Bohman puts it, 'some degree of cultural specificity is required for the public sphere to have a critical function'.[68]

Bohman's notion of differentiated cosmopolitan public sphere resonates strongly with the way many regime negotiations take place, particularly in the environmental domain. It also resonates to some extent with the idea of epistemic communities developed by Peter Haas to explain the role of non-state actors in regimes negotiations.[69] However, as Molly Cochran has argued, epistemic communities are more limited and more specialized communities of inquiry that are not specifically oriented to addressing global democratic deficits.[70] While epistemic communities and cosmopolitan public spheres have much in common – indeed, they often overlap – the latter engage in a more practical, critical inquiry that seeks to make those exercising public power more accountable to those affected.

Cosmopolitan public spheres have played an important role in many environmental regimes, such as the Biosafety Protocol. However, they have had relatively less influence on the multilateral trade negotiations, which have typically operated further from the deliberative ideal than multilateral environmental negotiations. To be sure, some phases of the trade negotiation process (such as private 'green room' discussions) have been more conducive to deliberation, at least among the privileged states, than the open meeting room, where official postures must be carefully maintained and choreographed. However, these private negotiations are not socially inclusive and they fail the test of critical publicity.

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[64] Habermas, *The Inclusion of the Other*, 177.
[65] Bohman, 'The Globalization of the Public Sphere,' footnote 60.
[66] Bohman, 'The Globalization of the Public Sphere', 211.
[67] Bohman, 'The Globalization of the Public Sphere', 210.
[68] Bohman, 'The Globalization of the Public Sphere', 213.
[69] Peter Haas, 'Introduction: Epistemic Communities and International Policy Coordination', *International Organization* 46 (1992): 1-35.
[70] Molly Cochran, 'International Public Spheres as Knowledge Communities Grounded in Human Values', Paper presented to the International Studies Association Annual Meeting, Montreal 2004. Cochran's conceptualization of international public spheres derives from John Dewey rather than Jurgen Habermas.

Indeed, the formal Trade Negotiating Committee (TNC) of the WTO has been relatively impervious to political opinions circulating in transnational civil society, which has generated widespread and familiar protests. As we have seen, negotiations within the TNC more typically cleave towards the bargaining rather than deliberative model.

However, the same cannot be said for the judicial arm of the WTO. One reason we can expect the exchange of arguments before the Panel to more closely approximate the ideal of unconstrained deliberation than political negotiation in the WTO is because the Panelists occupy different social and institutional roles to the trade negotiators. Unlike the trade negotiators, persons occupying positions on Panels or the Appellate Body are expected to be disinterested in the sense that they do not favour the position of any of the parties. Members are selected on the basis of the relevance of their expertise, professional experience and personal integrity. Indeed, Joanne Scott has defended what she calls the 'democracy enforcing' character of the judicial arm of the WTO.[71] This arises not only from the important role of the judiciary in ensuring procedural justice, which is basic to any court or quasi-judicial tribunal, but also on the special character of judges as disinterested decision makers who must themselves provide coherent, persuasive and public reasons for their decisions in response to the arguments they have heard or read. In a similar vein, in identifying the conditions that are conducive to effective deliberation in global governance, Thomas Risse and Cornelia Ulbert suggest that public deliberation is more likely to have an influence when the structure of the public sphere in the international realm resembles legal reasoning in front of a court, where it is assumed that those who must evaluate the argument are neutral, and when 'the negotiations are embedded in and take place in front of a transnationally constituted public sphere requiring justification and legitimation'.[72] Against this background, it can be seen that the judicial arm of the WTO presents the most promising site for reasonably transparent deliberation compared to the trade negotiation bodies, and that the *amicus curiae* submissions in *EC-Biotech* have served to intensify this capability.

Turning to the second departure from Habermas's traditional model, the lines of accountability between the political opinions and arguments of actors in specialized, cosmopolitan public spheres, on the one hand, and rule makers or interpreters, on the other hand, are less formalized and more diffuse than at the domestic level. They can also vary significantly from one regime context to another. For example, in the negotiation of multilateral environmental regimes, NGOs, corporations, the media, scientists, policy think tanks and international organisations have played a crucial role in identifying and publicising the relevant problem (or downplaying it), developing policy relevant knowledge, research and political agenda setting, negotiating policies and rules (sometimes as members of official delegations), monitoring and implementation.[73] The participants in these communication networks typically attend regime negotiations, or 'tune-in' via modern communication technologies to stay in touch with relevant delegates and negotiating

[71] In developing this distinction I was prompted by Joanne Scott, 'European Regulation of GMOs: Thinking about "Judicial Review" in the WTO', Jean Monnett Working Paper 04/04, NYU School of Law, New York, 2004, 12. However, Scott focuses mostly on the role of the judiciary in upholding procedural fairness rather than deliberation.

[72] Risse and Ulbert, 'Deliberately Changing the Discourse', footnote 50, 10.

[73] See Peter Newell, *Climate for Change: Non-State Actors and the Global Politics of Greenhouse* (Cambridge: Cambridge University Press, 2000).

texts in the formal conference and the reaction of constituents elsewhere in the world. From the perspective of the formal negotiators, the world – via these cosmopolitan public spheres – is literally watching, a fact that can sometimes have a chastening effect on the formal negotiators.[74] In this respect, the specialized public spheres that surround and sometimes infuse regime negotiations play an increasingly important filtering role between the rule-makers and more generalized public spheres at the national and local level. Since regimes 'piggyback' on the steering powers of other existing institutions',[75] most notably states, this filtering is also crucial to the successful implementation of regimes.

While the same cannot be said for trade negotiations, the *amicus* briefs in *EC-Biotech* have generated a green public sphere within the judicial arm of the WTO while also influencing broader public spheres beyond (regionally and domestically). The history of argumentation in the dispute is publicly accessible and has become the subject of widespread interest and discussion.[76] However, the requirement of specialized knowledge for *amicus curiae* interventions departs somewhat from Habermas's ideal of unconstrained communication about matters of public importance. Whereas Habermas's ideal maintains that the status of the speaker is irrelevant and only the substance of the argument should matter in any unconstrained deliberative setting, *EC-Biotech* suggests that the status and expertise of the speaker matters a great deal in the legal context of the WTO dispute settlement process. Indeed, the primary point of *amicus* submissions is that the *amici* have special forms of knowledge that go beyond that possessed by the parties and laypersons that it is necessary for the court to hear. However, these forms of knowledge represent not simply specialized expertise in biotech matters but also specialized expertise *acquired and exercised by NGOs and academics on behalf of a generalized public* that transcends the interests of those nation-states and biotech companies that have a stake in the dispute. This is consistent with Bohman's articulation of differentiated, cosmopolitan public spheres insofar as the *amicus* briefs serve to marshal, crystallize and articulate public concerns in a form that is rendered relevant and intelligible to a specialized court. In effect, *amici* translate the concerns of civil society from 'noise' to a 'signal' that is able to be 'read' by the WTO's governance structure. Of course, it remains an open question whether the arguments advanced by the *amici* have any 'force', as judged by the Panel. However, whatever the outcome, the submission has deepened and widened the range of arguments and interests represented in *EC-Biotech*.

[74] See especially the various publication series of the International Centre for Trade and Sustainable Development (http://www.ictsd.org/) and of the International Institute for Sustainable Development/Linkages/Environmental Negotiations Bulletin (http://www.iisd.ca/); both sites offer free electronic subscriptions for regular comprehensive information and analytical services on environmental and trade negotiations.

[75] Bohman, 'International Regimes and Democratic Governance, 510.

[76] Virtually all the submission, summaries of the oral arguments and rebuttals of the parties can be downloaded from Genewatch's site at http://www.genewatch.org

What is 'Green' about this Specialized Public Sphere?

There are two, interrelated senses in which the specialized public sphere generated by the *amicus* briefs may be characterized as 'green'. The first is that they represent a differentiated, cosmopolitan public sphere that marshals arguments and opinions that defend reflexive modernization as against simple modernization. Indeed the core feature of the green public sphere, according to Douglas Torgerson, is that it 'poses a challenge to the once comfortable framework of industrialist discourse'.[77] The green public sphere is part of a plurality of public spheres that directly confront what Torgerson calls the 'administrative sphere', which is a sphere of specialized, technocratic communication pressed into the service of an orderly and predictable process of modernization.[78] Translated into the language of critical theory, the green public sphere addresses the mismatch between the requirements of functional systems and the needs of the lifeworld.

The second sense in which the *amicus* briefs may be characterized as green is that they promote deliberation on behalf of not only present generations of humans but also what I have elsewhere referred to as the 'neglected environmental constituency' – future generations, nonhuman species and ecosystems that cannot represent themselves. David Held has also written extensively about the democratic deficit in global governance, arguing that the challenge for those seeking global democracy is to find ways of reconnecting decision makers with those affected, which he calls the 'community-of-fate'.[79] Building on Held's work, I have reformulated an 'ambit claim for ecological democracy' as requiring that all those potentially affected by risks (which may be called the 'community-at-risk'[80]) should have some meaningful opportunity to participate or *otherwise be represented* in the making of the policies or decisions that generate such risks.[81] The radical ecological dimension to this formulation is that it literally extends to *all* those affected in space and time, including present and future generations as well as human and non-human species. The more that governance structures provide forms of participation and representation that aspire to this ambit claim, the more we can expect that decisions will be (i) risk averse; and (ii) designed to avoid the unfair externalization of any remaining risks onto affected third parties.

The *amicus* briefs may be thus be seen as a form of public interest advocacy that provides a proxy form of representation for a constituency that cannot represent

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[77] Douglas Torgerson, *The Promise of Green Politics: Environmentalism and the Public Sphere* (Durham: Duke University Press, 1999), xi. Torgerson provides the first systematic development of the concept of the green public sphere.

[78] Torgerson, *The Promise of Green Politics*, x, xii, 10-11.

[79] See, for example, David Held, 'Democracy and Globalization' in Danielle Archibugi, David Held and Martin Kohler (eds.) *Re-imagining Political Community: Studies in Cosmopolitan Democracy* (Cambridge: Polity 1998), 22 and 'The Changing Contours of Political Community' in Barry Holden (ed.) *Global Democracy: Key Debates* (London: Routledge, 2000), 30.

[80] I prefer the phrase 'community-at-risk' over Held's 'community-of-fate' since not all members of the community that are exposed to ecological risks necessarily share the same fate (i.e., suffer the same degree of harm). Moreover, there is nothing inevitable or predetermined about the outcomes since the incidence of harm following exposure to ecological risks is always unpredictable.

[81] Robyn Eckersley, *The Green State: Rethinking Democracy and Sovereignty* (Cambridge, MA: MIT Press, 2004), Chapter 5.

itself. In effect, their representations approximate the ideal of ecological democracy insofar as they extend the range of stakeholders (in space and time) whose interests are considered in an effort to reduce the opportunity for the parties to externalize unwanted risks to 'non-members'.[82] In the sense, the critical representations of the *amicus* briefs point to the inextricable links between environmental democracy and environmental justice.

Conclusion

WTO member states and transnational NGOs clearly have different views not only about the costs and benefits of trade liberalization but also who should be included in trade negotiations, and how trade deliberations should be structured and conducted. As we saw above, the extraordinary General Council meeting convened to express disquiet over *amicus curiae* briefs provides a clear affirmation by WTO members that they do not wish to widen the rules of membership and relinquish the model of 'executive multilateralism'. At best, NGOs may be 'consulted' as 'stakeholders' at the domestic level but they enjoy no formally recognized authority as multilateral rule-makers. While examples can be found in other policy domains where non-state actors have acted as instigators, authors, subjects and even enforcers of international law, recognition of these developments remains embryonic and contentious in the WTO context.

However, as the scope and reach of the trading regime deepens, the opportunities for 'vertical accountability' to domestic parliaments and civil societies diminish and the demand for more direct, horizontal forms of accountability will inevitably increase. Michael Zurn has described these new forms of horizontal accountability as representing 'reflexive denationalisation', which facilitate reflexive modernization on a supranational scale.[83] *Amicus curiae* briefs may be seen as one example of 'horizontal accountability', in this case, of the judicial arm of the WTO to a specialized, cosmopolitan public sphere. The authors of the briefs in *EC-Biotech* have marshaled the research, arguments and opinions that have circulated in this specialized public sphere and presented them in a digestible form to the Panel. As an ad hoc form of intervention that is at one remove from the rule-making body of the WTO, the submissions provide no direct challenge to traditional multilateralism. However, in enabling transnational public interests to be represented in the interpretation of WTO law, the *amicus curiae* briefs provide a modest bridge towards a more expansive conception of the international political community and a more complex model of multilateralism.

The *amicus curiae* briefs are also of strategic importance. The submissions appeal to that arm of the WTO that is currently most receptive to arguments that transcend the economic interests of states. This is not an insignificant point of intervention given that the number of complaints brought under the WTO's new

[82] Of course, it is possible that affected parties may reach a considered view that risks ought to be accepted on the basis of the benefits they may bring, but it seems highly unreasonable to expected that 'the neglected environmental constituency' – nonhuman species, ecosystems and future generations – would, if they had the notional choice, agree to trade their own interests for the benefit of the present generation of humans.

[83] Zurn, 'Global Governance and Legitimacy Problems', 262.

dispute settlement mechanism has increased significantly compared to the old General Agreement on Tariffs and Trade (GATT). Whereas the Panel decisions under the pre-1995 GATT could only be adopted by consensus, which gave any member state a right of veto, the new rules require consensus among all parties in order for the Panel's report to be rejected (which makes acceptance automatic). This significant change has conferred on the judicial arm of the WTO considerably more powers in shaping the application and development of the global trading rules. In this new post-1995 context, the *amicus curiae* brief may be understood as a carefully orchestrated strategic intervention in the service of communicative interaction.

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